SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58

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BARBARA HINEY,

Plaintiff,

-against- Index No.

CITY CENTER OF MUSIC & DRAMA, INC., 150615/12

Defendant.

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DONNA MILLS, J. :

Defendant moves for summary judgment dismissing the complaint.

This is a personal injury action. Plaintiff sustained serious injuries on June 21, 2011 when she tripped and fell at the second floor lobby area at the David H. Koch Theater, a premises operated, maintained and managed by defendant corporation, while attending the 2011 Greater New York Health Association Annual Reception and Awards Ceremony. Plaintiff states that she fell as a result of tripping on a low level wooden enclosure which surrounded recessed lights in the promenade area. She is suing defendant for the negligent maintenance of a dangerous or defective condition on the premises.

Defendant moves for dismissal on the grounds that the condition at issue was open and obvious and not inherently dangerous. Defendant claims that the condition, namely a barrier to the grating of the lighting system located in the promenade, has been in place for over 40 years, and more than 13 million people have walked in that area, without incident. Until the commencement of this suit, defendant contends that there have been absolutely no accidents or complaints relating to the condition. Moreover, defendant claims that the premises is in full compliance with the applicable building code standards.

Defendant submits a copy of plaintiff's deposition transcript. Plaintiff testified that she was attending a work-related event at the theater with colleagues. She stated that she was standing on the terrace of the premises for about 10 minutes and then looked towards the promenade through a glass door. Noticing another person, plaintiff testified that she walked towards him and tripped over the barrier surrounding the grating, though she did not recall whether she contacted either the width or length portion of the barrier before falling. Plaintiff also stated that she did not look down as she walked, and did not see the barrier before the incident.

Defendant also submits the deposition testimony of its chief of security, Clement Mitchum. Mitchum described the promenade and the floor to ceiling glass walls that separate the promenade from the terrace. Regarding the barriers around the grating, Mitchum testified that he knew of no prior complaints, violations or incidents of accidental tripping over the area.

Defendant submits affidavits from Edward Gebel, its chief engineer, and Scott Cameron, an expert inspector and a registered architect. Gebel asserts that the barrier which surrounds the grating was installed in 1967 in order to protect the integrity of the grating itself. Gebel concludes that the barrier is not a dangerous condition, whereas it has been in existence for over 40 years without an accident occurring.

Cameron states in his affidavit that he reviewed the information submitted by plaintiff's liability expert, Nicholas Bellizzi, taking issue with most of his conclusions. Bellizzi contends that the premises is in violation of specific code regulations. Cameron claims that Bellizzi's conclusions are erroneous, as they are based on the 1968 City Building Code. Cameron avers that the 1938 City Building Code is applicable here, since the theater was built in 1964 and the

barrier installed in 1967. According to Cameron, the barrier is in compliance with that code. Cameron also expresses the opinion that, based upon his expertise, the reason for the incident was plaintiff's temporary distraction and loss of attention.

Defendant argues that, based on the evidence submitted, there is no cause of action for negligence here, and its summary judgment motion for dismissal should be granted.

In opposition, plaintiff contends that there is an issue of fact as to the existence of a dangerous condition maintained by defendant. Plaintiff also accuses defendant of spoliation of evidence.

Plaintiff argues that the accident was the result of her falling over a movable, low-lying wooden barrier which was dark brown in color, causing it to blend with the dark colored floor. The area was not illuminated at that time, which plaintiff attributes to the ample sunlight which shone into the promenade. Plaintiff claims that she never saw the barrier prior to the accident, and that there were no signs which would have made her aware of the barrier's presence.

Plaintiff submits affidavits from her colleagues Lydia Galeon and Elliot Brooks, who were present on the premises and witnessed the accident. Galeon claims that given the crowded conditions in the promenade at the time, especially in the area close to the doorway leading to the terrace, the barrier was a trip hazard. Galeon states that it was practically impossible to notice the barrier amidst the crowd, and that there was no clear paths for walking from one point to another. This, according to Galeon, would distract one's attention from the barrier, and would raise doubt as to its open and obvious condition. Brooks claims to have also witnessed plaintiff's fall and makes similar statements about the barrier being a trap hazard in a crowded space.

The affidavit of engineer and liability expert Bellizzi discusses his subsequent analysis

and evaluation of the area where the accident occurred. Bellizzi comments on the movability of the subject barrier, claiming that this indicates a violation of both the 1938 and 1968 City Building Code. He makes a distinction between barriers that are fixed and those that are portable and removable at will. Moreover, he concludes that the barrier might have been open and obvious in a sparcely populated space, but on the occasion of a crowded reception, this was a very different condition.

Plaintiff relies on the statements of Galeon, Brooks and Bellizzi to raise the issue of a defectively maintained condition on defendant's premises. Plaintiff claims that Mitchum, defendant's security chief, did not witness the accident and did not view the surveillance tape which likely recorded the accident. Plaintiff contends that his testimony is not conclusive. Regarding the surveillance tape, plaintiff states that at the time of the accident, defendant had a camera system in place which recorded the promenade area all day. Due to defendant's failure to preserve the tape of the accident, this court found defendant responsible for spoliation of evidence and held that an adverse inference charge would be given to the jury at the time of the trial.

Plaintiff disputes the expert qualifications of Gebel when he affirms the safety of the barrier. She questions the accuracy of Cameron, who inspected the premises over four years after the accident. She avers that neither alluded to the portability of the barrier in their affidavits.

Plaintiff argues that the charge of spoliation of evidence and the failure to dispute the issue of a defective condition precludes the granting of summary judgment to defendant. Plaintiff contends that the issue of an open and obvious condition remains one of fact.

In reply, defendant contends that the scope of the adverse inference charge has not be

made clear at this time. Defendant claims that the affidavits of Galeon and Brooks are speculative and misleading. Defendant insists that plaintiff's accident was more likely the result of personal distraction. Defendant disputes Bellizzi's characterization of the barrier as portable. Claiming that the barrier was installed with brackets and clamps, defendant reaffirms its position that the barrier is only subject to the 1938 City Building Code.

"It is axiomatic that summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of factual issues." *Birnbaum v Hyman,* 43 AD3d 374, 375 (1st Dept 2007). "The substantive law governing a case dictates what facts are material, and '[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment [internal quotation marks and citation omitted].'" *People v Grasso,* 50 AD3d 535, 545 (1st Dept 2008). "Where a defendant is the proponent of a motion for summary judgment, it has the burden of establishing that there are no material issues of fact in dispute and thus that it is entitled to judgment as a matter of law." *Flores v City of New York,* 29 AD3d 356, 358 (1st Dept 2006). "Once the defendant demonstrates its entitlement to summary judgment, the burden then shifts to the plaintiff to present facts, in admissible form, demonstrating that genuine, triable issues exist precluding the granting of summary judgment." *Id.*

"A landowner has a duty to maintain its property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to third parties, the potential seriousness of the injury and the burden of avoiding the risk (citations omitted)." *Boderick v R. Y. Mgt. Co., Inc.,* 71 AD3d 144, 147 (1st Dept 2009). This duty applies equally to landowners and tenants operating places of public assembly, such as theaters, requiring them to provide the public with a

"reasonably safe premises, including safe means of ingress and egress." *See Branham v Loews Orpheum Cinemas, Inc.*, 31 AD3d 319, 322 (1st Dept 2006). "In order to recover damages for an alleged breach of this duty, the plaintiff must ... demonstrate that the defendant created or had actual or constructive notice of the hazardous condition" that caused plaintiff's injury. *See Boderick*, 71 AD3d at 147.

What constitutes a dangerous or defective condition "depends on the particular circumstances of each case." *Gutierrez v Riverbay Corp.*, 262 AD2d 64, 64 (1st Dept 1999). "[T]he question of whether a condition is open and obvious is generally a jury question, and a court should only determine that a risk was open and obvious as a matter of law when the facts compel such a conclusion (citation omitted)." *Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69, 72 (1st Dept 2004).

The court finds two issues of fact from the evidence. First, there is the issue as to whether the barrier is inherently dangerous. Both sides dispute the nature of the barrier. Defendant states that the barrier is subject to the 1938 City Building Code and not to any subsequent codes. Plaintiff avers that due to the portable nature of the barrier, the requirements of the subsequent City codes, specifically 1968 and 2008, are applicable. Plaintiff claims that the barrier is not of a permanent nature and post-1967 installations were possible. According to plaintiff, defendant failed to submit revised plans to the Building Department for approval. Defendant clearly questions the portability claim.

The second issue concerns whether the barrier constituted an open and obvious condition. Plaintiff has raised an issue as to the crowded space at the time of the accident, making the area not readily observable. Mitchum, defendant's security chief, testified that at least 200 people

were in the promenade area at that time. The lack of the tape that might have recorded the accident has resulted in the court relying on eyewitness testimony. The affidavits from plaintiff's colleagues, which are not conclusory, indicate that the open and obvious condition is not factually conclusive.

The court finds that defendant has not demonstrated the absence of material issues of fact entitling it to summary judgment.

Accordingly, it is

ORDERED that defendant's motion for summary judgment dismissing the complaint is denied.

DATED: 12/31/15

ENTER:

J.S.C.

DONNA M. MILLS, J.S.C.